IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 631

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL,
and DONALD LESTER,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

MELVIN S. LOUISON
LEONARD LOUISON
8 Taunton Green
Taunton, Massachusetts

LAWRENCE F. O'DONNELL
One State Street
Boston, Massachusetts

Counsel for Petitioners

INDEX

SUBJECT INDEX

CITATIONS

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Opinions Below

The last opinion of the Court of Appeals (R. 135-141; 148-149) is reported at 303 F.2d 747. This was a supplemental opinion to an earlier opinion of the Court of Appeals which is reported at 296 F.2d 527 (R. 86-97). Opinions of the District Court pertaining to this appeal are reported at 199 F. Supp. 905 (R. 130-134) and 206 F. Supp. 213 (R. 75-79). Earlier opinions of the Court of Appeals and of this Court in this case are reported at 269 F.2d 688 and 365 U.S. 85.

Jurisdiction

The judgment of the Court of Appeals was entered on May 22, 1962 (R. 142). Petition for Rehearing was denied on June 26, 1962 (R. 150). The petition for a writ of certiorari was filed on July 21, 1962, and was granted on December 3, 1962 (R. 151), 371 U.S. 919. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether or not the sanctions of 18 U.S.C. 3500, subsection (d) may be applied only if "bad faith" be shown where the original notes of an F.B.I. Agent have been destroyed, and if so, what constitutes "bad faith" under such a doctrine.

2. Whether the phrase "substantially verbatim" as used in 18 U.S.C. 3500, subsection (e)(2) means "actually verbatim", "substantially accurate" or "a fairly comprehensive reproduction of the witness' words".

(a) What is the statutory definition of the phrase "contemporaneously recorded" as used in 18 U.S.C. 3500, subsection (e)(2).

3. Whether or not interview notes made by an F.B.I. Agent in the presence of a witness which are read back to the witness and which are approved by the witness are producible as a statutory statement under 18 U.S.C. 3500, subsection (e)(1).

(a) Would the result posed by Question No. 3 differ if the F.B.I. Agent's narrative in going over the interview with the witness included everything in his notes and also some additional words or matters where the witness approved the entire narrative *in toto*.

4. Whether or not an Interview Report which is a third person transcription of interview notes and which is checked for accuracy against the notes is a "copy" of the interview notes as that word "copy" was used by this Court in *Campbell*, 365 U.S. at 93.

5. If the original interview notes of the Agent have been destroyed and regardless of the reason for the destruction, does the Interview Report, which is a "copy" of the notes, become producible either as a statutory statement under (e)(1) or (e)(2) or both in lieu of the notes or as secondary evidence in lieu of the sanctions of 18 U.S.C. 3500, subsection (d).

Statute Involved

The statute involved is Title 18 U.S.C. §3500—the so-called Jencks Act. This statute is set out in its entirety in the Appendix, *infra*.

Statement

The petitioners here were convicted of bank robbery and each was sentenced to a term of a twenty-five years imprisonment. On certiorari (365 U.S. 85), this Court remanded the case for further proceedings without vacating the convictions. Further proceedings were had before McCarthy, *D.J.* (R. 1-74). He reimposed the same sentences (R. 80-85). On appeal, the case was again remanded under directions by the court below (R. 86-97, 99). Further proceedings were held before Wyzanski, *D.J.* (R. 100-129). On further appeal, the court below affirmed the judgments of the District Court (R. 142). The court below subsequently denied a petition for rehearing (R. 150). The case is now before this Court on a writ of certiorari to

the Court of Appeals for the First Circuit, the petition for a writ of certiorari having been granted on December 3, 1962 (R. 151). All issues presented pertain to the so-called Jencks Act—18 U.S.C. 3500.

1. F.B.I. Agent John F. Toomey testified in both remand proceedings in the District Court (R. 1-49; 109-128). On the day following the robbery, Mr. Toomey interviewed the witness Staula in the Canton, Massachusetts, police station (R. 2, 109-110). He made notes of what Staula told him (R. 3, 4). He interviewed Staula in the morning (R. 2) and later that evening, he went back to his office in Brockton and dictated from these notes to a disc on a dictating machine (R. 30). The disc was sent to the Boston F.B.I. office for transcription. Some five or six days later, he received back what is now called the Interview Report (see 365 U.S. at 90) from Boston for approval (R. 17). He checked the Interview Report with his notes to make sure it was an accurate transcription of his notes. After being satisfied it was an accurate transcription of his notes, he destroyed his notes in accordance with customary and standard practice of the F.B.I. (R. 16-17, 18, 23, 41-43, 124-125). However, Leo Laughlin, then the Agent-in-Charge of the Boston F.B.I. office testified that the destruction of these notes is optional with each agent (R. 60-62).

2. Agent Toomey interviewed Mr. Staula on the day following the robbery (R. 2). The interview lasted for a half hour (R. 11, 27) and his notes were written on a lined pad (R. 9) of standard size, 8½ x 11 (R. 11). Agent Toomey took notes while Staula recited his experiences, and then he asked Staula questions and took notes of his answers (R. 7). He then went over his notes with Mr. Staula in narrative form to be certain the story was accurate (R. 7, 27, 113). See also the description by the judge

of exactly what the Agent said and did in going over his notes in narrative form with the witness Staula (R. 114-115).

Agent Toomey called the Interview Report a "typewritten transcript of the interview" (R. 17). The Interview Report contained everything that was in his notes (R. 18) and the descriptions and one other statement were quotes of Staula's own words (R. 22, 29, 118-119). The use of third person phrases or words of indirect discourse, such as "It was stated . . ." and "Mr. Staula went on to state . . . " was "to reflect statements made by the witness Staula" (R. 22). The Interview Report was produced from the notes (R. 44) and has the same meaning as the notes (R. 26). The only things not in the notes that were in the Report were certain adjectives, completely spelled out words instead of abbreviations, and introductory and third person phrases (R. 25-26, 34-38). There was nothing in the notes that is not contained in the Report (R. 25).

The only matters stated by Staula at the interview which were not contained in the Agent's notes were about hiding his own money and being afraid of getting locked in the vault (R. 31, 36). However, he had complete notes on all pertinent information (R. 32) and relied primarily on his notes in dictating the Interview Report (R. 32-33).[1] Anyone who had the same knowledge of the case that Toomey had would have been able to make the same transcription of his notes that he had made (R. 120-121). Toomey did not change any observations made by Staula (R. 128) and the only difference between what was in his notes and what Staula told him was that he, Toomey, put it in narrative form (R. 127, 128).

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[1] See conclusions in this regard in the opinion of Judge Wyzanski in 199 F. Supp. 905 at 906-907 (R. 131-133).

If Toomey had lost the disc he had dictated on from his notes and dictated a second disc from his notes a half hour later, the recordings on the two discs would have been substantially the same (R. 128).

3. This section involves approval of the notes under subsection (e)(1) of the statute. The relevant facts from section No. 2 immediately above are incorporated herein by reference. As stated therein, Mr. Toomey took notes of what Staula told him and also of Staula's answers to his questions (R. 7). He then double checked his notes with Mr. Staula (R. 7) by going over the entire story in narrative form, reading from his notes as he did so sentence for sentence (R. 115). When he read to Staula, as nearly as he could, he incorporated the exact words in his notes into the narrative form of his statement to Staula (R. 119). He checked with Staula as to the accuracy of his notes (R. 115-116). Mr. Staula himself testified that Toomey read the paper he was writing on back to him (R. 105) and Staula told Toomey that to the best of his knowledge, the notes he read back were true accounts of what happened (R. 107). (See also R. 7-8.)

Agent Toomey testified that his notes contained the whole story given him by Staula (R. 20) and he did not recall going over anything with Staula that was not in his notes (R. 21). His one objective in taking notes was to get the whole story from Staula (R. 14). He had received training in interviewing witnesses and used his training in this interview (R. 15).

Agent Laughlin testified that an F.B.I. Agent would reduce all pertinent information derived from a witness to writing in his notes (R. 66) and that an Agent is taught to go over his notes with a witness and inquire whether the story is as he has it or is a recitation of the story as the witness gave it (R. 69).

4. This issue here is as to whether or not the Interview Report in this case is a "copy" of the Agent's investigative notes. Some of the facts relevant hereto have already been included in sections Nos. 2 and 3 of the Statement section of this Brief and are incorporated herein by reference.

There was nothing in the notes that was left out of the Report (R. 18) and the Report has the same meaning as his notes (R. 26) and reflects the information furnished him by Staula (R. 27). The notes were not destroyed until they were compared with the Report for accuracy and the transcript or Report found to be accurate (R. 16-17, 23, 124-125). The Interview Report is neither a photocopy nor a carbon copy of the notes (R. 23) nor an absolutely identical copy of the interview notes. The only matters not in the notes which are included in the Report are words of indirect discourse, spelled-out words instead of abbreviations, and certain adjectives. In all other respects, including verbatim descriptions and a quotation, the Interview Report and the interview notes contain the same information and have the same meaning.

5. This issue presupposes an affirmative answer to Question No. 4, i.e., that the Interview Report is a "copy" of the interview notes. Of course, if the Report is not a "copy" of the notes, then we have a situation where the government will claim that the Interview Report is not producible as a "statement" under (e)(1) or (e)(2) nor as a "copy" of the interview notes. The issue would then be raised as to whether a defendant in a criminal trial would have any rights to discovery or any remedy for the lack thereof where the original notes are destroyed in subjective good faith and the defendant has not been furnished the information in any other manner. This Court recognized the importance and complexity of this issue and posed it in the first *Campbell* case, 365 U.S. at 98. The court below in effect

held that a defendant in such a case is without remedy since, in the absence of bad faith, the question of the statutory quality of the original notes is "academic" (R. 148-149).

Summary of Argument

The approach to be submitted by the petitioners to the overall question of discovery in a criminal case under 18 U.S.C. 3500 is that within the statute, a defendant on trial has a right to discovery, perhaps even a constitutional right since the statute, to the extent that it goes, reaffirms the holding of this Court in the *Jencks* case.[2] See *Campbell* v. *United States*, 365 U.S. 85 at 93. Therefore, it is submitted that discovery is to be had fairly liberally within the framework of, and under the limitations set by, the statute.

1. Petitioners argue that once a defendant establishes a foundation under the statute for the production of a "statement", i.e., shows a prima facie entitlement to the production of a document, he has a vested right under the statute to get either the statement or the equivalent information. Failing thereof, he is entitled to have the sanctions of subsection (d) imposed. The petitioners have maintained throughout all these proceedings that the phrase "in the possession of the United States" meant in the government's possession at any time and not at the precise time the document is called for production. Since the statute was obviously enacted for the benefit of the Government, the Gov-

[2] Even under the harmless error doctrine of *Rosenberg* v. *United States*, 360 U.S. 367, the very least a defendant would be entitled to would be some document containing the same information as the document denied to him or unavailable due to destruction. See also *Killian* v. *United States*, 368 U.S. 231, 244.

ernment should have no right to destroy such a "statement" even if done in subjective good faith. The destruction of the notes and the alleged absence of any other producible document in its place may certainly constitute bad faith when looked at by an objective standard. Otherwise, it is a foolproof device for avoiding discovery under the statute. Under the guides set out for statutory construction, there is a presumption against the enactment of a useless statute.

2. The phrase "substantially verbatim" was never intended to mean actually verbatim with perhaps a little leeway for a typographical error or the inclusion of an occasional meaningless word as was suggested by the court below. All the decisions of this Court to date point to a contrary conclusion. The test of "substantially accurate" as used by Judge Wyzanski in his opinion (R. 131 *et seq.*) is a fair and equitable one and protects the rights of the Government and the defendant as well as the witness, if the protection of the witness is in any manner relevant hereto.

If an Agent makes notes while the interview is in progress and at some later time, the Agent dictates a Report from the notes, then the Report is a contemporaneously recorded document within the meaning of subsection (e)(2).

3. There should be nothing less in dispute in this case than that Agent Toomey went over his notes with Staula and received either actual or tacit approval of his notes. It must be borne in mind that it is not the story of the witness that is subject to approval under subsection (e)(1) but rather the agent's notes, regardless of how they are written or what they contain. The only question that should be in issue is whether the matter of approval of the notes is now moot or academic because the notes have been destroyed. The court below says it is; the petitioners submit it is not.

4. The petitioners submit that an Interview Report which is made from investigative notes, has the same meaning as the notes, contains all the information that is contained in the notes, and has nothing added except introductory words, certain adjectives, words of indirect discourse and spelled-out words instead of abbreviations is a "copy" of the investigative notes.

5. Where there is a right, there must be a corresponding obligation, or at least some form of remedy for the possessor to enforce his right or to seek redress for the violation or denial of his right. At this point, assuming *arguendo* that this Court should now hold that having in mind the requirements of the Sixth Amendment, the legislative history of this Act, and the *Jencks* and the first *Campbell* cases, a defendant has a right to discovery within the statute, then an Interview Report which is a "copy" of the investigative notes should stand in the place of the notes either under (e)(1) or (e)(2) regardless of whether the Interview Report, standing by itself, would be producible under (e)(1) or (e)(2).

ARGUMENT

Introduction

The court below has construed this statute—18 U.S.C. 3500—in a very restricted manner and applies super-literalistic standards throughout its discussions of the statute. It makes the statute almost impossible to comply with as a practical matter, and from a point of view of due process to a defendant on trial in a criminal case, it gives him almost no rights at all to discovery under the statute. The court said that "the primary consideration (in enacting the statute) was protection of the F.B.I." and that the F.B.I. "has a legitimate interest in maintaining secrecy on a broad base" (R. 91). The court went on to say (R. 92):

> "... If, for any reason, valid impeachment material does exist, a defendant is entitled to have the benefit of it. But this is, in a sense, a windfall, rather than the performance of a duty owed. The word 'windfall' may sound alarming, but either there is a duty owed or there is not. We do not find in the statute any such duty...."

Standing opposed to that language of the court below, in the view of the petitioners, is the language of this Court in *Campbell* v. *United States*, 365 U.S. 85, 92:

> "...To that extent, as the legislative history makes clear, the Jencks Act 'reaffirms' our holding in *Jencks* v. *United States*, 353 U.S. 657, that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in possession of the Government touching the events or activities as to which the witness has testified at the trial.... The command of the statute is thus designed to further the fair

and just administration of criminal justice, a goal of which the judiciary is the special guardian."[3]

Petitioners submit that the very limited and restrictive approach taken by the court below was unwarranted in view of the express, above-quoted language of this Court in *Campbell*.

Perhaps the key to this entire problem rests in the settling finally, through this case, of the approach to be taken. In the view of the petitioners, the rationale of *Campbell* is that discovery is to be had on fairly liberal terms within the framework of the statute. It is quite obvious that the Act limits the type of material that can be called for and the time when production can be demanded. It is also quite clear, however, that once the basic requirements of the statute have been met, discovery does not thereafter depend on the art of semantics and hairsplitting.[4]

In that respect, petitioners submit that phrases used in the statute such as "statement", "substantially verbatim", and "contemporaneously recorded" have special meanings under the statute and are not necessarily limited at all by dictionary definitions. Obviously, a statutory "statement" can be anything at all that meets the requirements of the Act. In *Killian* v. *United States*, 368 U.S. 231, the Government frankly conceded that a receipt was in fact a statutory "statement". Likewise, an Interview Report or an Agent's notes could be a statutory "statement".

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[3] The holding of this Court in the *Jencks* case is so well known as not to require repetition here.

[4] In construing the definition of the word "copy" as used by this Court in the earlier *Campbell* case, the court below applied such a restricted standard that it was forced to resort to the use of a footnote to explain to a reader that they were discussing (e)(1) and not (e)(2) containing the "substantially verbatim" phrase.

The same is also true of the phrase "substantially verbatim". From a dictionary standpoint, that which is verbatim is not merely substantial and that which is substantial is not verbatim. Therefore, it can be seen that this phrase must receive a definition applicable to this Act, and it must not be one which is so strict as to limit the function of the statute which is "to further the fair and just administration of criminal justice".

The following arguments, based upon each of the questions presented, are submitted on the theory that the Act does give a defendant a "right" to discovery within the limitations of the Act and that the language of the Act is not intended to unduly restrict discovery after the preliminary conditions of the Act have been met.

1.

The Application of the Sanctions of Subsection (d).

On this point, the court below held that only on a showing of bad faith could a motion to strike be granted under subsection (d).[5] This is perhaps an oversimplification of what is not only an important problem but also a rather complex one.

The petitioners have at all times maintained that destruction of the notes for any reason should be regarded as the equivalent of noncompliance with an order to produce under subsection (d). The use of the phrase in subsection (b) "in the possession of the United States" meant in the possession of the United States *at any time* and not just

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[5] Based on this, the court below held that the question of whether the original notes would be producible if they had not been destroyed is academic (R. 148-149). This will be argued *infra* in this Brief.

at the precise moment in a trial when a statutory order to produce is made. To limit this time only to the time when the order to produce is made makes the problem fraught with dangers of unfairness and opens up subsidiary questions of whether the government might be guilty of chicanery in giving any reason for nonpossession at the time of the order. The court below held there was no duty whatever on the government to preserve notes (R. 92), and this brings up the question again of "bad faith".

The question arises as to whether bad faith is to be judged by an objective or subjective standard. A defendant would rarely, if ever, be able to make a showing of subjective bad faith, and an objective standard would be much fairer to defendants and provide definite guidelines for governmental conduct. Since the testimony was, and the court below found, that the notes were destroyed in accordance with standard F.B.I. practices (although, in fact, the destruction of notes is optional with each agent), failure to adopt the objective standard as a rule of law would amount to an open invitation to circumvent the Jencks Act by means of the very type of practice employed, apparently in subjective good faith, in the instant case. Cf. *People* v. *Betts*, 272 App. Div. 737, 74 N.Y.S. 2d 791 (1st Dept., 1947), where the New York Appellate Courts held that a police officer's destruction of his notes to avoid being cross-examined therefrom constituted "bad faith" as a matter of law notwithstanding the trial court's finding of subjective good faith on the part of the officer.

The case at bar is not a case such as *Rosenberg* v. *United States*, 360 U.S. 367, 371, where this Court said that a "court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled . . ." There is no doubt in this case but that the petitioner Lester

was convicted solely on the testimony of Staula and that Staula had some cumulative effect on the Campbell brothers. Staula told Agent Toomey that he only saw two people in the bank and never saw a third robber (R. 110-111). Not only does it not take a defense lawyer, it hardly needs anyone trained in the law at all to see that such a statement would constitute classical impeachment material. This is diametrically opposed to his identification of three men at the trial. A person on trial for his life or liberty should not lose the benefit of classical impeachment material based on the test of subjective bad faith on the part of an F.B.I. Agent, especially where this Court has enumerated both in *Jencks* and *Campbell* that fundamental fairness requires that the interest of the government in a prosecution is not to win a case but to see that justice "shall be done". Notice by direct contrast that if Staula had made a positive identification, he would have been asked to sign the interview notes,[6] and presumably, the notes would have been kept for use at a trial. In other words, if the notes help the government, they are signed and preserved; if they do not help the government, they may, in the discretion of the Agent, be destroyed. Whereas this may not be subjective bad faith, it certainly may be objective bad faith.

The court below holds in effect that there is no duty on the F.B.I. to preserve notes, that there is no right as such in a defendant to get any statement, and that subsection (d) does not apply in the absence of bad faith. This ignores commands, *Palermo* v. *United States*, 360 U.S. 343 at 362-363, involving Sixth Amendment rights in the discovery of

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[6] Although included in the designation, this testimony was unfortunately omitted in the printing of the official record. However, Agent Toomey did testify about having a witness sign the notes if there were a positive identification and this appears in the original record filed in this Court in response to the writ of certiorari in Volume I, page 41.

these statements and that a defendant is *entitled* to relevant and competent statements for impeachment purposes because the *command* of the Jencks Act is to "further the fair and just administration of criminal justice", *Campbell* v. *United States*, 365 U.S. 85, 92. It would not be much of a right, even with its constitutional overtones, if it can be defeated by merely destroying the notes—even though in subjective good faith.

The court below said that " . . . either there is a duty (on the government) or there is not" (R. 92). Likewise, a defendant on trial either has a right or he does not. If there is a duty, then the breach of it must carry either an alternative remedy or else carry sanctions. There is always the possibility of an innocent person being convicted on the testimony of a mistaken or overzealous witness, and "although the F.B.I. has an interest in maintaining secrecy on a broad base" (R. 91), it should not be such as to destroy the rights of a defendant in a criminal trial. This would be violative of the spirit and requirements of due process.

Petitioners submit that the holdings of the court below are too harsh and bring about a result which was not intended by the Congress in enacting the statute. The complete lack of remedy if subjective good faith is shown violates the spirit of the constitutional and common-law standards.

There may still exist another possible alternative to imposing the sanctions of subsection (d) under the doctrine of secondary evidence[7] which will be discussed under No. 5, *infra*.

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[7] It should be noted that the members of this Court who joined in the concurring opinion of *Palermo* v. *United States*, 360 U.S. at 363, did not feel that this statute provided an exclusive vehicle for discovery in all events.

The question of remedy here is of the utmost importance since the defendants did not receive this information at all during the trial. The court below held the question of producibility of the notes under (e)(1) was academic because there was a lack of showing bad faith (R. 148-149). If that be so and no "copy" were given to the defendant, then there is no duty, no right, and no remedy. It is highly doubtful that this result was intended either by the Congress in enacting this Act or by this Court in interpreting it. It is obviously a highly undesirable result since it can have the effect of being an instrument to end discovery rather than to limit it.

2.

The Interview Report Is a "Substantially Verbatim" and "Contemporaneously Recorded" Statement.

As argued above, both of the statutory phrases used in the title of this section just above have statutory definitions peculiar to this Act, separate and apart from any dictionary meanings these same words might have. In *Palermo* v. *United States*, 360 U.S. 343, this Court there held that the particular interview report in question was not a substantially verbatim statement. Although the result was reached unanimously, a concurring opinion was filed which recognized certain danger signals if the result were misinterpreted by the lower courts. Sure enough, the court below dismissed the Jencks aspect of the first Campbell appeal without any discussion by merely citing *Palermo*. Thereafter, on certiorari, this Court *unanimously* remanded this case on the issue of whether this Interview Report was a substantially verbatim "statement". Despite the very obvious fact that the Report, which was before this Court, contained third person phrases and could not have been

exactly verbatim, the court below persisted in imposing all but impossible to attain standards and a very literalistic definition of "substantially verbatim". The court below referred to the test of "substantially accurate" as being too loose a construction (R. 93). It is difficult to see how the court below retained its viewpoint of form over substance after the earlier action by this Court in this case.

"Substantially verbatim" clearly does not mean exactly word for word as the Government attempted to bring out in its questioning of Toomey and as was intimated by the court below. The standards advanced by the court below are so rigid that nothing short of a statement taken by a police stenographer, court reporter, or a recording device would ever be producible under (e)(2), and that type of statement would be a rarity when an Agent is away from his office interviewing witnesses at the scene of a crime or at their homes or businesses. As noted by Judge Wyzanski (R. 132), the notes in this case resembled the type of notes which until two decades ago were used as the source of records in criminal appeals in federal courts. In this respect, this Court said in *Palermo*, 360 U.S. at 352:

> "We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements."

This Court also said in *Palermo*, 360 U.S. at 353, that "we do not wish to create the impression of a 'delusive exactness' ". Judge McCarthy, in his opinion (R. 75-79) quotes from *Palermo*, 360 U.S. at 352-353[8] wherein it speaks of "summaries of an oral statement which evidence substantial selection of material or which were prepared after the interview without the aid of complete notes . . . " In

[8] The Government used the same quote on p. 11 of its Brief in Opposition to the Petition for Writ of Certiorari.

the case at bar, these objections do not obtain at all. Mr. Toomey testified that he "had complete notes with respect to the pertinent information on this witness" (R. 33) when he dictated his Report. There cannot be found anything anywhere in the entire record of this case to show that any impressions of the Agent are contained in the Report, that the Agent did any editorializing, that there was any "substantial selection of material", or that there was a lack of "complete notes". As noted above in the Statement section of this Brief, the Report is an accurate transcript of the interview notes and has the same meaning as the interview notes. Actually, there is no reason not to allow discovery at this point. The witness' identity is no longer secret nor is his testimony. There is very apt language in the concurring opinion of *Palermo*, 360 U.S. at 365-366, pertaining to this:

> "... Congress made crystal clear its purpose only to check extravagant interpretations of Jencks in the lower courts while reaffirming the basic holding that a defendant on trial should be ENTITLED to statements helpful in the cross-examination of government witnesses who testify against him. Although it is plain that some restrictions on production have been introduced, it would do violence to the understanding on which Congress, working at high speed under the pressures of the end of a session, passed the statute, if we were to sanction applications of it *exalting and exaggerating its restrictions,* in disregard of the congressional aim of reaffirming the basic Jencks principle of *assuring* the defendant *a fair opportunity* to make his defense. Examination of the papers so seduously kept from defendant in this case and companion cases does not indicate any governmental interest, *outside of the prosecution's interest in conviction,* that is served by

nondisclosure, and one may wonder whether this is not usually so. There inheres in an OVERRIGID interpretation and application of the statute the hazard of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production." (Emphasis added.)

There is still another aspect to this issue involving the phrase "substantially verbatim". In this case, the Interview Report contains one quotation and the descriptions contained therein are the witness' own words. The following quotes from the concurring opinion in *Palermo* are appropriate to this issue. This Court said at 360 U.S. at 364-365:

"If such a transcript would be producible, how distinguish a *substantially faithful* reproduction, made by the interviewer from his notes or from memory, of any part of the interview? Since, as the Court's opinion concedes, statements made up from the interviewer's notes *are not per se unproducible*, one would suppose that a summary, part of which gave a substantially verbatim account of part of the interview, would, as to that part, be producible under the statute." (Emphasis added.)

Further, the concurring Justices said, 360 U.S. at 365:

"Certainly, a statement can be most useful for impeachment even though it does not exhaust all that was said upon the occasion. We must not forget that when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation. . . . Here too, the constitutional question close to the surface of our holding in Jencks must be borne in mind."

It should be borne in mind that Mr. Toomey is a trained, highly skilled Agent of the F.B.I. with 18 years of experience who received specialized training in taking notes and making reports.

The court below further held that the Report could not qualify under (e)(2) because it "was not contemporaneous with Staula's oral statement to Toomey" (R. 137). Despite this holding by the court below, the actual test to be applied is whether there was a contemporaneous recording from which the transcription was later made. This test was stated in exact terms by Mr. Justice Frankfurter in *Palermo*, 360 U.S. at 351-352, and again in *Campbell*, 365 U.S. at 107, n. 3. The ruling of the court below in this respect is clearly erroneous.

3.

Approval of the Agent's Notes Under Subsection (e)(1).

There can be no dispute about the fact that Agent Toomey made notes during his interview with Staula. Staula himself testified that after the notes were taken, the notes were read back to him and he signified approval by saying what was read back to him was true (R. 106-107). Agent Toomey demonstrated how he went over his notes and the judge described it as reading from his notes before speaking, and then repeating the sequence (R. 115), and he incorporated the exact words of the notes into his narrative (R. 119). (See also R. 7.) On this record, no other conclusion can fairly be reached than that Agent Toomey received approval of his notes from Staula.[9]

In the discussion of subsection (e)(1) in its opinions of November 7, 1961 (R. 86-97), and May 22, 1962 (R. 135-141),

[9] No claim is made that Staula ever read the notes himself or that he signed them.

it is difficult to make out what standards the court below applies to this section. It almost appears as if the test of "substantially verbatim" were being applied to (e)(1).

It must be borne in mind that under (e)(1), it is the Agent's notes that are to be approved and has nothing to do with the size or content of the witness' story or the use of language by the witness himself. The notes could be anything at all so long as they were read back to and approved by the witness, in writing or otherwise.[10] As one Justice of this Court observed during oral arguments on the previous *Campbell* case, it would not matter if the notes were written in hieroglyphics so long as they were read back and approved. The notes need not be in the witness' own words at all. See 75 Harv. L. Rev. 179, 181-182 (1961). Petitioners believe that the Solicitor General's Brief in the previous case conceded (at p. 22 n. 9) that the Agent's longhand notes would be producible under the circumstances now shown to exist. Staula's signature was not essential if the notes were otherwise adopted or approved (365 U.S. at 93-94).

The court below said that "a writing not specifically approved is not producible in spite of its general accuracy if it is not substantially verbatim" (R. 90). This appears to be confusing, but in any event, it can hardly be said that Toomey did not go over exactly what he had in his notes and receive specific approval of his notes. The notes, under (e)(1), do not need to be generally accurate (provided, of course, they are approved) or substantially verbatim. If the witness approved the entire narrative and all the notes are included therein, then the notes are approved. There

[10] The court below and the Government in its Brief in Opposition state that any approval not in writing must be something "comparable to a signature" (R. 94). In its context, this defies definition. No definition in this regard was attempted either by the government in its brief or by the court below in its opinion.

is no evidence in this case of the Agent adding anything of substance to his narrative when he went over his notes that was not in his notes.

As an additional matter of F.B.I. routine, Chief Agent Laughlin testified that an Agent is taught to go over his notes with a witness to check the accuracy of his notes. In the final analysis, the court below declined to rule on the producibility of the Agent's notes under (e)(1) because this was in its view an academic question because the notes were destroyed and not in bad faith.

There can be no doubt on this record but that if these notes were still in existence, they would be producible under (e)(1).[11]

4.

The Interview Report Is a "Copy" of the Agent's Notes.

Nothing will ever be clearer from the state of this record than that the Interview Report is a "copy" of the Agent's notes as that word "copy" was used by this Court in *Campbell*. The facts pertaining hereto are fully set out in the Statement section, *supra*, and need not be repeated here in detail. The Report is neither a photocopy nor a carbon copy, but it contains all the information and has the same meaning as the notes. It is therefore a "copy". The court below held that for the Report to be a "copy", it must be identical in every respect "barring perhaps minor misspellings, typographical errors and the like" (R. 140). This view is not only too restrictive and too literal, it is unrealistic, especially in view of the commands and purposes of the Jencks Act. Such a ruling does not meet the

[11] Judge Wyzanski held the Interview Report was producible under (e)(1) and (e)(2). Judge McCarthy held the notes, if still in existence, would not be producible under (e)(1). (R. 77).

ends of justice and violates any constitutional rights that attach to a defendant by reason of this Act and under principles of due process.

5.

The Interview Report as Secondary Evidence of the Agent's Notes.

This issue is a very comprehensive one as petitioners here seek an answer as to whether or not a defendant has any right to discovery under the statute and whether there is any duty imposed by the statute on the government. Also, this provides a possible alternative remedy for the destruction of the original notes rather than imposing the sanctions of subsection (d).

If the original notes otherwise qualify and have been destroyed, there is no reason in fairness or in justice why the best or secondary evidence rule should not be applied. This may perhaps be the compromise solution to the "good faith" and "bad faith" alternatives to subsection (d) as discussed *supra*. Certainly, the Interview Report is the best evidence of what was contained in the interview notes. On the evidence contained in this record, there is utterly no danger of distortion or misquotation.

The substitution of a report based on interview notes destroyed in good faith for the notes themselves was approved as proper practice in *United States* v. *Thomas*, 282 F.2d 191, 194-195, C.A. 2 (1960). This result seems a fair one since the destruction of the notes has prevented the court from conducting the *voir dire* generally necessary to determine whether the notes are "substantially verbatim" or whether the Report is a "copy" of the notes. In such a case, the Government, should be estopped from withholding a report which was actually made from the destroyed notes.

In *United States* v. *Greco*, 298 F.2d 247, 250, C.A. 2 (1962), the court there held that there was no "*legislative requirement that all notes be preserved after transcriptions have been made and checked for accuracy*". (Emphasis added.) Here, the defense was given the accurate transcriptions and therefore the destruction of the notes was held to be immaterial. Nowhere do we find a case with as harsh a result as was found by the court below in these Campbell proceedings where the defense was given nothing and no remedy whatever was awarded. The inference to be derived from *Greco* is that there might be a duty to preserve notes if transcriptions which are checked for accuracy are not made. Conversely, if they are made and the notes are destroyed, the transcriptions are then producible. See *United States* v. *McKeever*, 271 F.2d 669, 674-675, C.A. 2 (1959) and *United States* v. *Waldman*, 159 F. Supp. 747, 749, D.C.N.J. (1958).

If the original notes are producible under either (e)(1) or (e)(2) and are now destroyed and the Interview Report is not a "copy" of the notes, the petitioners "have been denied a statement to which they were entitled under the statute", *Campbell* v. *United States*, 365 U.S. 85, 98. Thus, this Court said that even if the Interview Report itself should be producible (such as a situation where the witness saw it and signed or approved it), the sanctions of subsection (d) might have to be employed. However, if the Report is a "copy" of the notes, then subsection (d) would not have to be employed. This is fair and reasonable and satisfies the requirements of due process.

The petitioners therefore submit that the original notes are producible under either (e)(1) or (e)(2) or both and that the Report is likewise producible. Further, the petitioners submit that the Report is in fact a "copy" of the original notes. If the Government persists in claiming the

Report is not a "copy" of the notes, then the testimony of the witness Staula should have been stricken under the provisions of subsection (d) when the motion was made at the original trial by the defendants and renewed by the defendants at the remand hearing before Judge McCarthy.

In summary, it appears that a defendant does have rights under the statute and the ruling by the court below to the contrary is erroneous. Any other conclusion would defeat the stated purpose of the statute and would probably be unconstitutional. The rationale of *Campbell,* 365 U.S. 85, seems to be that within the framework of the statute, discovery is to be had fairly liberally based on the holding of this Court in the *Jencks* case in order to see that justice is done.

Conclusion

It is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

MELVIN S. LOUISON
LEONARD LOUISON
8 Taunton Green
Taunton, Massachusetts

LAWRENCE F. O'DONNELL
One State Street
Boston, Massachusetts

Counsel for Petitioners

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APPENDIX

TITLE 18 U.S. CODE, SECTION 3500

"DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from

the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."